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IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 110.

OCTOBER TERM, 1919.

HENRY FRANCOMB, EMMA DONAHUE, HENRY LORIE, ET AL.,

Plaintiffs in Error,

vs.

THE CITY AND COUNTY OF DENVER, ET AL.,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

Reply Brief of Plaintiffs in Error.

T. J. O'DONNELL,
Attorney for Plaintiffs in Error.

J. W. GRAHAM,
Of Counsel.

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Reply Brief of Plaintiffs in Error.

It is most creditable to the counsel for the City that they do not undertake to defend the charter provision (Section 300) in question or the decisions of the Supreme Court of Colorado, either in 33 Colorado, or that

in the case at bar, upholding that provision as furnishing due process of law. On the contrary, counsel, inferentially at least, admit the soundness of the position of Plaintiffs in Error by this statement, found on page 5 of their brief:

> "If this was the first time that this question had been raised, or the first time that this section of the charter had ever been considered by the courts, *it might be that the issue presented would be debatable*, but the same identical question has been determined by the Supreme Court of the State of Colorado."

Counsel then attempt to take refuge behind *res adjudicata* and *stare decisis*, and, most curiously, and by a process of reasoning all their own, arrive at the conclusion that the decisions of the Colorado court are binding on this Court, in respect to the federal question involved, and, apparently, that the decision of the Colorado Court, construing the opinion of this Court in the LONDONER case, 210 U. S. 373, is also binding on this Court.

Counsel for the defendants in error seem to complain on the same page of the brief (p. 5), that the plaintiffs did not apply to the city authorities for relief. It would seem obvious that if the proceedings are void, the plaintiffs in error pursued the appropriate remedy in the appropriate tribunal; they appealed to a court of competent jurisdiction to prevent the sale of their property under the void assessment. If any precedent were necessary for a proceeding so patently regular, the practice adopted is conclusively sustained in BROWN V. DENVER, 7 Colo. 305, hereinafter quoted from.

Under the decision in that case, if we had actually appeared before the Board of Supervisors, we would not have been bound, and we submit that such is the logical conclusion and follows the well-known rule with relation to judicial tribunals, that appearance before a court, which lacks jurisdiction of the subject matter, does not bind the party appearing. An appearance before the Board of Supervisors could not confer on the Board of Supervisors power to *determine* the complaint made, and therefore such appearance would not bind the property owner.

We recognize that the discussion of this question is academic, except in so far as it irresistibly leads to the conclusion that, if by appearance the plaintiffs would not have been bound, they have lost no rights by failing to appear. If jurisdiction can not be conferred by *action*, it can not be conferred by *inaction*.

We will follow, as nearly as practicable, in this reply, the order of discussion adopted in the City's brief.

Preliminary Proceedings.

The plaintiffs in error have never claimed, and do not now claim, that any federal question is presented by the allegations of the amended complaint with respect to "preliminary proceedings." These allegations were presumably inserted in the original complaint and afterwards embodied in the amended complaint for the consideration of the courts of Colorado, and not for the consideration of this Court. Generally speaking, they do not present federal questions.

Due Process of Law.

Under this head counsel, on page 8 of their brief, state the proposition presented by plaintiffs in error as being, "that in order to afford due process of law an opportunity must be afforded to be heard before a *tribunal with jurisdiction to determine.*" And counsel then admit that "there is no question but * * * an opportunity must be afforded at some stage * * * for the taxpayer to be heard before a tribunal *competent to hear.*"

Counsel would have stated the position of plaintiffs accurately, had they stated their claim as being for an opportunity "*to be heard before a tribunal with jurisdiction to* **hear and determine.**

We should thus have brought the controversy down to the single and naked question of whether it is *enough* that the tribunal have power to *hear* and *unnecessary* that it shall have power to *determine.*

It will be observed that counsel do not attempt to justify the statement in the opinion in DENVER *v.* LONDONER, 33 Colo. (See page 305, quoted on page 25 of the plaintiffs' first brief), to the effect that the word "competent," as applied to such a tribunal, does not mean a tribunal possessing any particular power, "but, rather" a "tribunal *suitable* and legally qualified to act."

If counsel intend to ever defend that statement of the Colorado Supreme Court in the LONDONER case, they can never find a more appropriate place or fitting opportunity; but instead of undertaking such an impossible task, they content themselves by saying that the Supreme Court of Colorado has held, in the case at bar, that Sec-

tion 300 affords due process of law, and that it so held in 33 COLORADO, and that this Court so held in 210 U. S.; they characterize our contention that the question is not concluded by the decision in 210 U. S. as a "wonderful discovery."

Then follows (pp. 9, 10, 11) a long excerpt from 33 COLORADO, to show that the Colorado Supreme Court has held that the provision in question does afford due process of law.

If the Colorado Supreme Court had not so held, it must be assumed that this case would not be here. The fact that "this decision was rendered," as is said, "more than eight years before the present action was commenced," it is submitted can make no difference, inasmuch as the plaintiffs commenced their action within an appropriate time after the illegal attempt to impress their property with an unwarranted charge was made.

After commenting upon the holding of the Colorado Supreme Court, and stating that "The statute as construed" (by the Colorado Court) "was not obnoxious to the Federal Constitution," it is said: "A taxpayer could feel assured that if he followed the procedure provided by the charter, he would be heard before a tribunal that had jurisdiction to determine his complaints and objections."

Where such a tribunal is to be found, what provision of the charter provides it, what the tribunal is, these are nowhere pointed out. In making the statements quoted, counsel have had to abandon the holding of the Supreme Court of Colorado, that all that is necessary is a **"tribunal * * * suitably and legally qualified to act"** and to abandon their own position

in the first paragraph on page 8 of their brief, that **"a tribunal competent to hear"** is necessary.

BROWN v. CITY OF DENVER, 7 Colo. 305, is mentioned in the opening brief of the plaintiffs in error. It is cited and referred to in the opinion in DENVER v. LONDONER, 33 Colo. 104, and in the opinion in the case at bar.

In the opinion in the BROWN case, referring to "due process of law," it is said (pp. 311-12):

> "The doctrine of the authorities is that whenever it is sought to deprive a person of his property or to create a charge against it preliminary to or which may be made the basis of taking it, the owner must have notice of the proceedings and be afforded an opportunity to be heard as to the correctness of the assessment or charge. *It matters not the character of the proceedings* * * * whether administrative, judicial, summary, or otherwise; at some stage of it, and before the property is taken, or the charge becomes absolute against either the owner or his property, an opportunity for the correction of wrongs and errors which may have been committed must be given, otherwise the constitutional guaranties above cited are infringed. * * * As applicable to summary proceedings of the character under consideration, its meaning is comprehended in the foregoing paragraph. If the law authorizing the proceedings provides for notice to the owner * * * and an opporunity to appear at a specified time and place, before a board or tribunal *competent to administer*

> *proper relief*, in order that he may be heard concerning the correctness of the charge before it is made conclusive, the constitutional requirements are satisfied."

Then ensues language which, had it been followed by the State Court in the case at bar, would have rendered it unnecessary for plaintiffs in error to invoke the aid of this Court to protect their rights. We have printed the more salient statements in italics.

> "But when the validity of a law or ordinance is questioned upon the ground that it authorizes the taking of property without such notice or hearing, the objection is not obviated by proof that a hearing has been had, *as a matter of favor, in the case*. Nor does it satisfy the constitutional requirements that the assessment is fair and just. *A valid assessment can not be made under an invalid law or ordinance and its constitutionality is to be tested, not by what has been done under it, but by what it authorizes to be done by virtue of its provisions.*"

Citing, among other cases, DAVIDSON v. NEW ORLEANS, 96 U. S. 97.

Under the ordinance involved in PALMER v. WAY, 6 Colo. 106, and in BROWN v. CITY OF DENVER, *supra*, *notice* was given to the property owner *to build the sidewalk* or the City would cause it to be built at his expense. It was held, that this did not take the place of the notice and opportunity to be heard required

under the DUE PROCESS OF LAW provisions and principles now being discussed. This was, in effect, the same kind of notice and preliminary proceeding which was required under the charter provisions discussed in the LONDONER case, and under the like provisions of the charter in this case. As to such notice this Court held that *the preliminary notice not being required by any principle of the law of Due Process*, appellee to give it violated no right of the property owner, providing he had a hearing upon the assessment itself. (See our [illegible] brief, p. 31.)

Counsel cite the case of PUEBLO v. CHAMBERS REALTY CO., 44 Colo. 396, and say that the doctrine laid down by the Supreme Court of Colorado in the LONDONER case is there adhered to. The opinion in the PUEBLO case does not disclose that there was even a suggestion of the question presented here raised in that case; but had it been otherwise, its correct import is that *this Court is to be bound by opinions and decisions of the State Court only* when they [illegible]

The Supreme Court of Colorado, in the case cited, affirmed the judgment of the District Court avoiding an assessment because of irregularity in the giving of the preliminary notice. It is not our business to consider that decision with the definition in the LONDONER case in 33 Colo., that such preliminary notice is not essential; now are we concerned with whether the Colorado Court did there, either inferentially or expressly, assert the proposition that provisions, such as those found in Section 310 of the Denver charter, afford due process of law to one in the situation of plaintiffs in error.

A rather weak attempt is made to support one of

the property owners and when recommended by the Board of Health, and it was claimed such recommendation had been made.

The Supreme Court of Colorado in that case flatly refused to apply the principle of estoppel on the ground that the plaintiffs had allowed the work to progress to completion without making any objection. (P. 122.)

Res Adjudicata.

An attempt is made in the opinion of the Supreme Court of Colorado to show that the plaintiffs in error are foreclosed by the opinion in LONDONER *v.* DENVER, 52 Colo. 15, and what is said in the opinion on that subject is quoted in the brief of the City at pages 16 and 17.

It may be that plaintiffs in error are bound by the decision in 52 COLO. in relation to the matters alleged as to the preliminary proceedings, mentioned in the City's brief at pp. 6 and 7, and which have already been disposed of in this brief, by the showing that they are not here involved.

The question, to what extent property may be taken or charged under proceedings obnoxious to the DUE PROCESS OF LAW provisions of the Federal Constitution, because the State Court, in a suit brought by another property owner, has held that the law does not violate the Federal Constitution, is not before this Court in this case. Were the Court called upon to decide that question, it is submitted that this honorable Court would not indulge in any such circumfluent argument as that found in the brief for the City.

An examination of the case in 52 COLO., now relied

on as being *res adjudicata* against the plaintiffs in error, will disclose that the question now presented was neither raised nor decided. This is so conclusively shown by these two paragraphs of the opinion in the case that we quote them in full.

> "2. The charter provisions authorize the board of park commissioners to initiate the public improvements in question, and to finally determine whether the lands, necessary therefor, shall be acquired, subject, however, to the will of the owners of a certain percentage in area of the real estate to be assessed for the cost thereof, to annul that authority by expressing their disapproval of the proposed improvements within a designated time. It therefore, follows, that until the property owners have, by their non-action approved, or by their action disapproved the proposed improvements, the power to proceed lies in abeyance.
>
> "However, as the matters upon which the findings, here sought to be restrained, *pertain to questions preliminary in their nature*, they do not affect the constitutional rights of any party in interest. They might have been dispensed with by the law-making power, and full authority vested in the park commission, or other city authorities, to acquire the lands and make the proposed improvement without any preliminary proceedings whatever. As said in *Londoner v. Denver*, 210 U. S. 373, 379: 'The legislature might have authorized the making

of improvements by the City Council without any petition'."

The syllabi of the case, particularly paragraph 2 of clause four of the syllabi, shows clearly that what is decided in that case is that *"property owners will not be allowed, in advance of the passage of an ordinance as contemplated* by the Section (327), *an injunction to restrain the exercise of this power."*

Turning to Section 327, it is found that the provisions referred to are contained in the *proviso* of that section. This *proviso* is printed in full in our first brief, commencing on page 7.

The appeal to this Court to sustain the unjust exactions which the City of Denver is attempting to enforce against the property of the plaintiffs in error under the doctrine of stare decisis or res adjudicata, is repudiated by Colorado decisions.

The attempt to lug in "vested rights" and the proposition that we have waited until the work was done, have already been disposed of, and we think we have said enough to dispose of *res adjudicata* and *stare decisis;* but, if not, what is added here should suffice.

The Supreme Court of Colorado did not hesitate, in 1884, to declare invalid, in BROWN *v.* DENVER, 7 Colo. 305, an assessment to pay for sidewalks under an ordinance which it held to be valid in 1881, in PALMER *v.* WAY, 6 Colo. 106.

In PALMER *v.* WAY, the property owner *attacked*

before the sidewalk was laid. Brown *waited* until the sidewalk was laid. Figuratively, and probably literally, he walked to the courtroom on the sidewalk to get the decision which exempted him from paying for it. This and the KEYES CASE, already referred to, in 10 COLO., dispose of the pleas of counsel in the respects mentioned.

McQuillen on Municipal Corporations, Volume 5, Section 2220, page 4517, states the general rule thus:

> "Finally a property owner will not be estopped from contesting the validity of the assessment by remaining silent while the improvement and assessment is being made unless he knew (1) that it was being made (2 Ohio cases), (2) that the public authorities intended to assess the cost thereof, or some part of it, upon his property (Indiana, Iowa, 2 cases—Wisconsin), (3) *that the infirmity or defect in the proceedings*, which he is to be estopped from asserting, existed (Iowa, Michigan), and (4) *it must appear that some special benefit accrued to his property*." (Ohio.)

In the same volume, Sections 2123 and 2124, the author shows that the principles upon which counsel for the City rely apply only to cases in which *mere irregularities* in the assessment are asserted, and do not apply to cases where the facts are as shown by the record here.

Special Benefits.

Counsel have devoted a number of pages to our objections that the property of the plaintiffs is not specially benefitted. They say, p. 19:

> "The objections, as shown by the complaint, are so general in character as to not form any basis for a determination as to whether or not the property of the plaintiffs is benefitted or not."

We are quite willing that the complaint shall be judged by this criterion suggested by counsel.

> "The allegations must be such that the Court would be enabled from them to determine whether the property in question was specially benefited or not, and it should not be left to conjecture as to whether, or in what amount, the property was benefited."

The allegations of the complaint in this respect are epitomized and quoted from on pages 40 to 50, both inclusive, of our original brief, and there are others, but if the language there quoted does not plainly meet the requirement contended for by the City, we are confident that we could not present any argument which would strengthen it.

Upon this branch of the discussion counsel cite VOIGHT *v.* DETROIT CITY, 184 U. S. 115-122.

The case supports every position for which we contend, as may be gathered from the fact that it is stated in the opinion of MR. JUSTICE McKENNA that the State Supreme Court had decided that the amount of the assessment in such a case can not exceed the benefits. On hearing given him, the property owner had an opportunity to show that he was not benefited, or that the charge against his property exceeded the benefits, but he is not

entitled to notice of every step, and (p. 121) there is no claim that the property is not benefited, no claim that the owner did not have notice and opportunity to be heard, and in conclusion:

> "It would be difficult to find any provision fairer than this in purpose and which so essentially satisfies every requirement of due process of law. And such purpose can not be defeated if a hearing to the property owner can prevent defeat. He is given a **thoroughly efficient opportunity to be heard.** (p. 122.)

SPENCER *v.* MERCHANT, 125 U. S. 345, presents no question of notice or opportunity to be heard, but simply the power to re-assess, the first assessment having been declared void by the State Court for want of notice. "The land owners were given a hearing, and so there was no constitutional objection in that respect **nor was the hearing illusory,"** a statement pregnant with the suggestion that no such specious pretence of an opportunity to be heard, or hearing, as is contained in the Denver charter provision attacked, will suffice.

Indeed this Court must have sensed the possibility of just such an attempt as was made by the Denver City charter, to pretend to give a man a hearing which would comply with the constitutional requirement, but which would avail the property owner nothing; hence the phrase, **"nor was the hearing illusory."** 125 U. S., and **a thoroughly efficient opportunity to be heard."** 184 U. S.

Counsel again, on page 25 of their brief, recur to the proposition that because plaintiffs in error did not appeal to the disappearing and shadowy pretense of a tribunal, provided by the charter to *hear* their grievances, they can have no relief in the courts of the land. Their constitutional rights are lost because they failed to grasp at the will-'o-wisp held out to them by the Denver charter. We have already answered this phase of the curious argument evolved.

The brief of the City betrays a strange psychology, a psychology for which, doubtless, the attempts, by legislation and by judicial decision, to fence off the property owner and keep him away from and prevent him from having any opportunity to present his grievances, or relieve his property from excessive and illegal exaction, are responsible.

Barring the section of the charter directly involved in this case, and the decisions of the Colorado Supreme Court construing the same, this effort reaches its supremest phase in that section of the charter which was construed in CITY OF DENVER *v.* CAMPBELL, 33 Colo., 162, cited in the City's brief. This charter provision virtually says to the property owner:

> "You may pay the assessment against your property, in a lump sum, in thirty days,"

or,

> "You may pay in installments."

The alluring enticement to the property owner to pay is held out in the assessing ordinance in the case at bar. We beg to quote:

> "Section 3. *All the assessments* herein made *shall be due and payable within thirty*

days of the publication of this assessing ordinance without demand * * *, and when so paid, an allowance of four per centum flat * * * and also interest at the rate of five and one-half per centum per annum from the time of said payment to March 1, 1913, shall be made and deducted: *provided that* all such assessments may *at the election of the owners* be paid in *installments* with interest as hereinafter provided. *Failure to pay the whole assessment within said period of thirty days shall be conclusively considered and held an election on the part of all persons* interested, whether under disability or otherwise, to pay in such installments. *All persons so electing* to pay in installments *shall be conclusively considered and held as consenting to said improvements and such election shall be conclusively held and considered as a waiver of any and all right to question the power and jurisdiction of the said City and County to make said improvements*, the regularity or sufficiency of the proceedings, or the validity or correctness of the assessment."

If the property owner shall accept the first alternative and pay in full, he will from thenceforth be in the position of one of the characters described in a well-known bit of Western verse, for neither *"subsequent proceedings"* nor *precedent conditions* can interest him further.

If he fails to accept this spider-like invitation to pay in full, what happens to him is stated in the quotation from the CAMPBELL CASE printed in the City's brief, *i. e.*,

he is "conclusively presumed to have elected to pay * * * in installments, and having made this election" * * * is "precluded from thereafter raising any question with respect to the steps taken, or the regluarity of the proceedings which are purely statutory and not required by virtue of any provision of the constitution."

Certainly this is an ingeniously devised web, more ingenious than was ever spun by any arachnidan spinner, for the victim of this web is enmeshed, although he fly away, whereas in the other case the destruction of the victim follows his blind or wilful folly.

Counsel quote, on page 27, from WAGNER v. BALTIMORE, 239 U. S., 217-218. There is nothing in the opinion or in the theory upon which the special tax involved in that case was sustained which conflicts with this statement in the opinion of this Court in the LONDONER CASE, pp. 385-386:

> "But where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing. It must be remembered that the law of Colorado denies the land owner the right to object in the courts to the assessment, upon the ground that the objections

> are cognizable only by the board of equalization."

The decision in the BALTIMORE case is based on this fact, set out in the opinion of MR. JUSTICE DAY:

> "This assessment, and the classification of the property to be improved, were fixed and designated by legislative act. It was declared that the property which had been improved by paving theretofore should, according to the width of the paving in front of the respective properties, be assessed at a certain sum per foot front."*

In the case at bar all the charter does is to fix the territorial boundaries. All property within those boundaries (with certain specified exceptions) is to be assessed "in the proportions and amounts determined by the Commission and assessed by ordinance." (Charter, Sec. 327; see our original brief, page 7.) This language brings the case at bar within the principle for which we contend, and eliminates WAGNER v. BALTIMORE as authority.

In WAGNER v. BALTIMORE, the property was by the Act divided into three classes, (a), (b) and (c), and the rate of taxation upon each of the classes was fixed in the Act. The Tax Appeal Court of Baltimore was authorized and directed to classify and list all landed property in the city, which on a certain day was in a situation to come under the requirements of either of the classes. *It was required that before classification*

* The decision in Hancock v. Muskogee, 39 S. C. R. 528-30, is based on the same principle.

"with reference to the liability of the property for the tax and the claim to which it properly belonged."

BALTIMORE TRACTION CO. v. BALTIMORE BELT RAILROAD CO., 151 U. S. 137: We have not been able to find in the opinion the language quoted in the brief. The writ of error was dismissed in that case because no federal question was involved. We quote, "As the want of the requirement of notice did not exist, the alleged ground of our jurisdiction fails."

The case of GREEN v. NEAL, 6 Pet. 291, referred to in the Baltimore Traction Co. case, and quoted from *in extenso* in the brief of the City, presented a question arising under the Statute of Limitations of Tennessee. This Court had followed what it supposed was the construction of the statute adopted by the Supreme Court of Tennessee; that construction was never considered as having been finally adopted in Tennessee. If it were, Tennessee had changed, and this Court reversed itself to follow the Supreme Court of Tennessee in its construction of the Statute of Limitations.

There is nothing in the portion of the opinion quoted, nor in the case anywhere, to make it authority here. Its citation is cumulative evidence of the erroneous view held by counsel for the City as to the effect upon this Court of the decision of the Supreme Court of a State construing a State statute under circumstances such as are presented by the case at bar.

We are glad that counsel has called attention to the assessing ordinance, not only by reason of the provisions thereof already quoted in this brief, but because of the recital found on pages 28-29 of the transcript of record, showing that this so-called Board of Equalization, acting under Section 300 of the charter, "did duly *hear and determine*" the complainants and objections filed to this

two-million-dollar assessment, and did overrule the same, and *did recommend* to the Park Commission * * * *that no modification of its apportionments of said assessment * * * be made, save and except that the proposed assessment against two lots named be reduced in the sum of $11.05 for each lot.*

The charges of the original bill, although neither their truth nor materiality is before this Court for decision, are abundantly justified by the sham and pretence so apparent from this recital, of calling what occurred a hearing.

Conclusion.

Ending as they began, counsel's brief is pervaded with the thought that this Court is controlled by the Supreme Court of Colorado with respect to the question whether or not the charter provisions afford DUE PROCESS OF LAW.

We have shown that under the allegations of the amended complaint the plaintiffs below are not specially benefited.

We have shown that there will be no loss to innocent purchasers of the bonds issued.

We have shown that if there be any benefit from the improvement, as it is called, it is a general benefit, and, hence, morally chargeable against all the property of the people of the community benefited and not specially against the property of the plaintiffs, whose property is not specially benefited.

We have shown that even had there been special ben-

within the constitutional meaning of that word, by calling it so in the title.' So, in SOON HING v. CROWLEY, 133 U. S. 703, 710: 'The rule is general, with reference to the enactments of all legislative bodies, that the courts can not inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactment.' In MUGLER v. KANSAS, 123 U. S. 623, 661, the court, after observing that every possible presumption is to be indulged in favor of the validity of the statute, said that the judiciary must obey the Constitution rather than the law-making department of the government, and must, upon its own responsibility, determine whether, in any particular case, the limits of the Constitution have been passed."

The merchant sloop of CHIEF JUSTICE MARSHALL, in delivering the opinion of the court, in McCULLOCH v. MARYLAND, 4 Wheaton, 316, 431:

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create, * * * are propositions not to be denied",

has never been successfully disputed and is no longer denied.

It is that "power to destroy" under the guise of "power to tax" that is involved here. We believe that no more vicious attempt to penetrate the barriers erected by the great pronouncements of this Court to protect the property of individual citizens from communal greed and ruthlessness, has ever been brought to the attention of this Court. We are persuaded, and we respectfully hope we have been able to convince this Court, that here is a plain, palpable attempt to evade and escape the restraint, against lawless expropriation and confiscation, *under the guise of the "power to tax"*, which this Court has so often laid upon the hand of the despoiler.

All of which is respectfully submitted.

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J. W. GRAHAM,
Of Counsel.

"Help Me, Cassius, or I Sink."

City prior to the time the present learned counsel for the defendants appeared, ever discovered the saving grace lurking in Section 327. District Judge Dennison, now Mr. Justice Dennison of the Supreme Court of the State of Colorado, the Judge who passed upon the demurrer, did not attempt to extract any balm from Section 327. He held that the Supreme Court of Colorado had decided in the LONDONER case, 33 Colo., that Section 300 *did* afford due process of law. In the Supreme Court of Colorado, voluminous briefs were filed and oral argument had. The opinion of the Colorado court was handed down January 7, 1918. The present honorable city attorney, senior counsel for the City here, and other learned counsel appeared for the City in the State Supreme Court (Tr., p. 55, fol. 103).

The opinion of the Colorado Supreme Court rests its judgment upon the proposition that the Court had decided in the LONDONER case, 33 Colo., that Section 300 afforded due process of law, and that this Honorable Court had so held in the LONDONER case, 210 U. S. There was a petition for rehearing. Briefs were filed by the present learned counsel and other counsel in opposition to such petition. Then the case came to this Court, and, as stated in the supplemental brief, counsel for the respective parties attended upon this Court to argue the case. A month or more elapsed after counsel had gone home, when—"Sudden as thought came like a full blown rose" the discovery that Section 327 affords the necessary DUE PROCESS OF LAW, and that section 300 is mere surplusage.

Under these circumstances, we submit that the presumptions are against counsel and lead to the conclusion

that this late-day reliance on Section 327 is a *dernier resort*. Certainly it would seem most unfair to hold the plaintiffs in error foreclosed of their right to a hearing as to the justice of the charge made against their property, because they construed the charter provisions involved exactly as they were construed by the City government, including the City's legal advisers, and as they were construed by the *nisi prius* and Supreme Courts of Colorado.

Aside from this, the position assumed in the supplemental brief is untenable. It has no support in either reason or authority.

Section 327 relates to and prescribes certain preliminary proceedings of the nature which both this Court and the Supreme Court of Colorado in the LONDONER case held to be unnecessary. If the giving of the notice provided for in the section was unnecessary, the *failure* to appear in response to the notice could not be prejudicial.

In LONDONER V. DENVER, 52 Colo. 15-50, already referred to in this brief and in the brief for the defendants in error, the Supreme Court of the State, in denying the taxpayer's right to relief, says (p. 25):

> "The only constitutional right possessed by the property owner, as to the making of the proposed improvement, is to a hearing upon the question of what is termed, the apportionment of the tax; *i. e.*, the amount of the tax which he is to pay. VOIGHT V. DETROIT, 184 U. S. 115; GOODRICH V. DETROIT, *Idem*, 432. This constitutional right is fully protected by

> the notice which the charter, Sections *209* and *328*, 'requires shall be given by the city clerk and the proceedings in accordance therewith, afford the owners full opportunity to be heard on the question of assessments against their property.' DENVER v. DUMARS, 33 Colo. 94, 101."

The decision in the LONDONER case, 52 Colo., is, in effect, a declaration that Section *327* gives the property owner no rights whatever, that everything offered in it is voluntary, something which the City might have withheld, that it limits no right which the City would have if that section were not contained in the charter.

That Section *327* conferred any such right had not then been discovered by the attorneys for the City.

The statement of counsel on page 5 of the supplemental brief, that "this section (*327*) * * * was not involved in previous cases decided by the Supreme Court of the State of Colorado, and was not involved in the LONDONER case, * * * in 210 U. S.," is rather remarkable in view of the facts.

MR. JUSTICE MOODY, in his opinion in LONDONER V. DENVER, 210 U. S., commencing at the bottom of page *375*, refers to provisions in the then charter of Denver, respecting the character of improvement involved in the LONDONER case, in language which we have quoted on page 28 of our original brief.

Turning to that charter in the Session Laws of Colorado for 1893, we find, at pages *202* and *203*, provisions identical with the provisions of Section *327*.

These provisions are contained in the clauses of Section 3 of Article 7, numbered First, Second, Third and Fourth. In spirit, purpose and effect, they are identical with the provisions of Section 327. Barring the difference in the various time periods mentioned, the variation in language incident to the difference in the nature of the improvement being provided for, and the substitution of "commission" for "board," the provisions are identical, frequently *totidem verbis*.

Compare the language of Section 327, which is printed in italics on page 4 of the supplemental brief, with this language of Clause Second of paragraph 3:

> "*And that all complaints and objections that may be made in writing* concerning the proposed improvements, *by the owner of any real estate to be assessed, will be heard and determined by the* board *before final action of the* board *thereon.*"

And this language of Clause Fifth:

> "The resolutions and orders of the board of public works may be modified, confirmed or recinded (rescinded) by said board at any time prior to the passage of the ordinance authorizing the improvements."

The error into which learned counsel have fallen seems to result from the use of the word "*apportionment*" in Section 327. This word is not found in the provisions of Section 3 of Article 7, to which we have alluded. The reason is that the improvement there provided for and involved in the LONDONER case in the Su-

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IN THE

Supreme Court of the United States

NO. 110

OCTOBER TERM, 1919.

HENRY FARNCOMB, EMMA DONAHUE, HENRY LORIE, ET AL.,
Plaintiffs in Error,

VS.

THE CITY AND COUNTY OF DENVER, ET AL.,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This action arose under the provisions of the charter of the City and County of Denver concerning special assessments for local improvements consisting of the creation of parks and parkways.

The City and County of Denver, by its charter, is divided into four park districts, among which is the East Denver Park District, and under the provisions of the charter with reference to public improvements a certain park scheme was established. This general scheme included

what is known as the "Civic Center"; and also included other parks and parkways, and the creation and improvement of certain boulevards and streets.

The general system provided by the charter, by which these public improvements are provided and the cost thereof assessed to property benefitted, is similar to other provisions which have been adopted in other cities in other states of the United States.

This action was brought in the District Court of the City and County of Denver, seeking to enjoin the City and its representatives from enforcing an assessment ordinance which had been passed for the purpose of collecting the moneys necessary to pay for the improvements in question. A number of objections were urged in the original complaint and the amendment thereto, and petitions in intervention filed, why the relief sought should be given, but counsel here now relies upon plaintiffs' assignment of error numbered 6 (trans. of record, p. 65, fol. 120; brief of plaintiff in error, p. 9). Briefly stated this assignment of error complains that Sec. 300 of the charter of the City and County of Denver does not afford due process of law and constitutes the taking of property without due process of law, and is, therefore, obnoxious to the fourteenth amendment to the constitution of the United States.

The amended complaint in the case was demurred to by the City and County of Denver, and the demurrer was, by the District Court, sustained. The plaintiffs elected to stand on their complaint and the case then went to the Supreme Court of the state.

The particular section of the charter which counsel claims is in violation of the rights of plaintiffs is Sec. 300. This is the same section of the charter which was passed upon in Londoner v. City and County of Denver, 210 U. S. 373, which section was then numbered 31, but to be fully understood it is well to have before the Court also Sections 298 and 299. The sections referred to are as follows:

"Section 298. Upon completion of any local improvement, or, in the case of sewers, upon completion from time to time of any part or parts thereof affording complete drainage for any part or parts of the district, and upon acceptance thereof by the board, or whenever the total cost of any such improvement, or of any such part or parts of any sewer, can be definitely ascertained, the board shall prepare a statement, showing the whole cost of the improvement, or such parts thereof, including not to exceed six per cent additional for costs of collection and other incidentals, and including interest to the next succeeding date upon which general taxes, or the first installment thereof, are by the laws of this state made payable; and apportioning the same upon each lot or tract of land to be assessed for the same, as in this article provided; and shall cause the same to be certified by the president and filed in the office of the clerk.

Section 299. The clerk shall thereupon, by advertisement for ten days in some newspaper of general circulation, published in the city and county, notify the owners of the real estate to be assessed, and all persons interested, generally and without naming such owners or persons, that said improvements have been or are about to be completed and accepted, specifying the whole cost of the improvements and the share so apportioned to each lot or tract of land or persons; and that any complaints or objections that may be made in writing by such owners or persons to the board of supervisors and filed with the clerk within sixty (60) days from the first publication of such notice, will be heard and determined by the board of supervisors at its first regular meeting after said sixty (60) days and before the passage of any ordinance assessing the cost of said improvements.

Section 300. At the meeting specified in said notice, or any adjournment thereof, the board of supervisors, sitting as a board of equalization, shall hear and determine all such complaints and objections, and may recommend to the board of public works any modifications of their apportionments; the board of public works may thereupon make such modifications and changes as to them may seem equitable and just, or may confirm the first apportionment and shall notify the council of their final decision; and the council shall thereupon, by ordinance, assess the cost of said improvements against all the real estate in said district and against such persons, respectively, in the proportions above mentioned."

The sections just quoted follow other provisions of the charter concerning the preliminary steps to be taken before this stage of the proceeding is reached, and refer to the assessment of property generally for local improvement purposes, but these same sections, 298, 299 and 300, are readopted by reference in Section 328 of the charter, and made applicable to the assessments for public parks. This section is as follows:

"Section 328. When the cost of any such park site or parkway is definitely determined, the park commission shall prepare, certify and file with the clerk a statement showing the cost thereof as required in Section 298 hereof; the clerk shall thereupon give the notice required by Section 299 hereof; and thereupon the same proceedings required in Section 300 hereof shall be had, except that the proceedings therein provided to be observed by the board shall be observed by the park commission; and the council shall thereupon by ordinance assess the cost against the other real estate as aforesaid, in the district, in accordance with said apportionments."

In the District Court, as well as in the Supreme Court below, the City contended that the provisions of the charter did constitute due process of law; that by the provisions of the Charter an opportunity was afforded to all taxpayers affected to be heard as to the justness of the assessment, and that the board before whom such hearing was had, had power to determine such objections.

Section 299, above quoted, provides for a publication in some newspaper of general circulation for a period of ten days, in order that all persons interested may file complaints or objections with the Board of Supervisors, and provides that all objections that may be filed within sixty days from the first publication shall be heard at the first regular meeting after said sixty days, and before the assessing ordinance is passed. Then Section 300 follows, in which the hearing, that the City contends complies with the provisions of the federal constitution, is contained.

The plaintiffs in this case made no effort whatever to file any complaints or objections to the assessments or to the apportionment that had been made by the park commission, although notice was given them, but waited until almost three months after the assessing ordinance had been passed, and then went into the District Court and commenced this action.

It is contended by counsel for plaintiffs that Section 300 of the charter does not afford due process of law, for the reason that the board of supervisors sitting as a board of equalization, before whom the hearing is to be had, had no power to hear and determine, but only power to recommend to the board of park commissioners the apportionment to be made in the assessment. If this was the first time this question had been raised, or the first time that this section of the charter had ever been considered by the Courts, it might be that the issue presented would be debatable, but the same identical question has been determined by the Supreme Court of the State of Colorado at least six independent times.

The section of the charter in question was first adopted in 1893, and from that time down to the present time its provisions have been acted upon and improvements have been made, and bonds issued, on the strength of the charter provision and the construction which the Courts of Colorado have given to it. And not only has the Supreme Court of the State of Colorado construed this statute as not obnoxious to the fourteenth amendment to the constitution of the United States, but this Court as well, in *Londoner v. Denver*, 210 U. S. 373, 380, has also held that the same section "is clear of *all* constitutional faults."

ARGUMENT.

Preliminary Proceedings.

The allegations in the amended complaint here under consideration, in reference to the preliminary proceedings, are practically identical with the matters that were considered by the Supreme Court of Colorado in the case of Londoner v. The People, 52 Colo. 15. It has been held repeatedly by the Supreme Court of Colorado that the regularity of the preliminary steps, the sufficiency of petitions of remonstrance, and all other questions preliminary in their nature to the passage of the assessing ordinance do not affect the constitutional rights of the taxpayer, and the same principle was held also by this Court in the Londoner case in 210 U. S. 373. Both Courts hold that these requisites might have been dispensed with altogether by the law-making power, and that the City could have acquired lands and made the proposed improvement without any preliminary proceedings whatever. It is only necessary at some stage in the proceedings that the property owners be given a hearing as to the apportionment of the tax.

As was said in City of Denver v. Londoner, 52 Colo. 15, 25:

> "This constitutional right is fully protected by the notice which the charter, Sections 299 and 328, requires shall be given by the city clerk, and the proceedings in accordance therewith afford the owners full opportunity to be heard on the question of assessments against their property."

See also:

Denver v. Dumars, 33 Colo. 94, 101;
Page & Jones on Taxation by Assessment, Secs. 125, 779 and 811;
Chase v. Trout, 146 Cala. 350, 359.

It is therefore respectfully submitted that all those allegations in plaintiffs' bill relating to the irregularity of the preliminary steps, such as the determination of the park board to acquire the lands and parkways, as to whether such lands were to be used for parks or parkways, as to whether sufficient petitions of remonstrance were filed, and as to whether fraud occurred in the taking of such preliminary steps, are foreclosed by the decision in the Londoner case, 52 Colo. 15, and by the other authorities referred to. Such questions are now no longer open to litigation, either by the plaintiffs in error in this case or any other taxpayer in the East Denver District. After these preliminary proceedings were had the assessing ordinance was passed, which declared the existence of the essential facts, and, as said by the Supreme Court of Colorado in the Londoner case just referred to:

> "This ordinance has the effect of a statute, and the mandate of the people of the municipality expressed through their charter is that such findings shall be conclusive upon every Court or other tribunal."

DUE PROCESS OF LAW.

Counsel has devoted a number of pages in his brief to the proposition that in order to afford due process of law an opportunity must be afforded to be heard before a tribunal with jurisdiction to determine. There is no question but what the general rule is, in taxation proceedings, whether in general taxation or taxation by local assessment, an opportunity must be afforded at some stage in the process of taxation for the taxpayer to be heard, and before a tribunal competent to hear, or the taxing law is obnoxious to the federal constitution.

In the present case the Supreme Court of Colorado has held that Section 300 of the charter did afford due process of law. It also held that the same question had been decided by it before, in cases in which the identical question had been raised. It also held that in the case of Londoner v. Denver, 210 U. S. 373, this Court had passed upon the same question and decided it in favor of the City, but counsel states that the question was neither presented to, nor decided by, the Supreme Court of the United States; also that the Supreme Court of the state did not pass upon the particular question, now raised for the first time.

In the case of *City of Denver v. Londoner,* 33 Colo. 104, the same case that was afterwards taken to this Court and reported in 210 U. S., *supra,* Section 300 of the charter was construed. It was construed in a manner to set at rest all the objections now made by counsel. Counsel now says that the only question passed upon by the Court was the question as to notice, and as to whether or not the failure to provide notice in the charter made it constitutionally objectionable, and that the wonderful discovery that he has now made was not passed upon at all. But the Supreme Court of Colorado passed directly upon both questions. It did pass upon the question of notice. It also construed the

charter and put a construction upon it which would render it in harmony with the "due process of law" provision of the federal constitution, in the following language:

> "When these proceedings have reached that stage where the board has concluded that in its judgment the improvement should be ordered, it recommends an ordinance which, however, can only be passed by the city council. It is not obligatory upon the latter to pass such ordinance. If, after considering the necessity of the improvement, the cost thereof, and the materials which are to be employed in its construction, the district to be assessed with the expense—in short, any and all matters relating to the improvement—it is of the opinion that the improvements should not be made for any reason, it is in the discretion of the council to refuse to pass the ordinance. If such ordinance is passed by the city council the contract for the work is not let by the board of public works, but by the mayor. When the work is completed it devolves upon the board of public works to make a preliminary apportionment of the expense on the property benefited thereby. As to certain improvements the legislature has directed how such apportionment shall be made. This, however, is not the levy of a tax by the General Assembly, but merely a rule adopted by that body for the apportionment of the cost of an improvement by the municipal authorities. This apportionment is certified by the board and filed with the clerk. The latter is then required to give notice to the owners of property to be charged with the expense of the improvement to file such complaints and objections touching the apportionment made as they may be advised. These objections are to be heard and determined by the city council, and it

is only after they have passed upon such objections as the owners may have interposed to the recommendation of the board of public works on the apportionment of the cost of the improvement that the city council is authorized to pass the assessing ordinance which makes the apportionment a lien upon the property chargeable therewith. This action constitutes the levy. So it appears that at all times the board is powerless to order any improvements, create a district, or levy assessments, but that all these matters are left to the action of the city council. But it is argued that in reality and to all practical intents and purposes it is the board of public works, and not the city council, which makes the assessment, because of the provisions in the charter—Sec. 31, Art. VII (Sec. 188) —which counsel for appellees insist leaves the city council without any discretion in passing the assessing ordinance after the recommendations of the council have been reviewed by the board. Notwithstanding the apparently mandatory words employed in Section 31, *supra,* we do not think that thereby the legislative power and discretion of the city council is taken away and vested in the board of public works, but that the former, in the exercise of its functions, *is empowered to pass an assessing ordinance charging property with the cost of an improvement, which, according to its judgment, would be just and equitable.*

In the case of the Board of County Com'rs. v. Smith, 22 Colo. 534, it was held that 'may' must be construed as 'shall' when an act of the legislature can be thereby upheld, if a contrary construction would render it obnoxious to a constitutional inhibition. The converse of this must be likewise true; and hence we conclude that if the

provisions of section 31 are objectionable because apparently mandatory upon the city council, they do not strip the latter of its legislative authority and discretion, but still leave it with the authority to pass an assessing ordinance in accordance with its own judgment. So far as urged upon our attention, we find no provisions of the charter relating to the board of public works or local public improvements which are unconstitutional." 33 Colo. 115-117.

This decision was rendered by the Supreme Court of the State in 1905, more than eight years before the present action was commenced. The Supreme Court of Colorado emphatically said that the action of the City Council in hearing and determining the grievances of the taxpayers was final, and that the City Council (or Supervisors) could, in the exercise of its judgment and the power intended by the section of the charter, finally determine the matter. It makes but little difference, as will be shown hereafter in this brief, whether the Supreme Court of Colorado was right or wrong in the construction that it placed upon this statute; it was a construction placed upon the statute by the highest court of the State of Colorado, and the statute as construed was not obnoxious to the Federal Constitution. A taxpayer could feel assured that if he followed the procedure provided by the charter he would be heard before a tribunal that had jurisdiction to determine his complaint and objections. The objection raised here is to a State statute, or rather a charter provision; it is not as to the method in which it was administered, and the statute is to be viewed, when the question reaches this Court, with the construction that the Supreme Court of the State has previously put upon it; but this matter will be separately treated in this brief under another topic.

The same question as involved in the Londoner case was also involved in the case of *City of Denver v. Dumars*, 33 Colo. 94, and in the case of the *City of Denver v. Ken-*

nedy, 33 Colo. 80, and again, in the case of *Spaulding v. City of Denver*, 33 Colo. 172.

In the case of *Pueblo v. Colorado Realty Co.*, 44 Colo. 590, the Supreme Court also adhered to the doctrine as laid down in Londoner, Kennedy and Dumars cases. This case arose under a general statute of the State with reference to public improvements, but the language of that statute is identical with Sec. 300 of the charter, now under consideration.

After the Londoner case was decided in 33rd Colo., the case was brought by writ of error to this Court, and decided in 210 U. S. 373.

Counsel criticizes the decision of our Supreme Court in the present case, and says that the precise question here involved could not be said to have been passed upon by the State Supreme Court in Londoner v. Denver, 33 Colo. 104, and that when Mr. Justice Moody wrote the opinion in the same case he did not have in mind the point now under discussion. He also says that the assignments of error in 210 U. S. were not broad enough to cover this question; but a reference to the 9th assignment of error, quoted on page 375 of the opinion in 210 U. S., shows that the identical question was under consideration, and if the Court cares to take the trouble to refer to the briefs filed in that case it will be found, on page 52 of the reply brief of plaintiff in error, that this question of the construction that the Colorado Supreme Court had put upon the statute was discussed. So, therefore, when this Court held that Sec. 31 (now 300) of the charter was clear of all constitutional faults, it had before it the ruling of the Supreme Court of Colorado placing a construction upon the statute, an assignment of error directed to the statute itself, and an argument of counsel in which the construction placed upon it by the Supreme Court was criticized and attacked. The whole matter was fairly presented to this Court and it held, referring specifically to this 9th assignment of error, as follows:

"The ninth assignment questions the constitutionality of that part of the law which authorizes the assessment of benefits. It seems desirable, for the proper disposition of this and the next assignment, to state the construction which the Supreme Court gave to the charter. This may be found in the judgment under review and two cases decided with it ,Denver v. Kennedy, 33 Colo. 80; Denver v. Dumars, 33 Colo. 94. From these cases it appears that the lien upon the adjoining land arises out of the assessment; after the cost of the work and the provisional apportionment is certified to the city council, the landowners affected are afforded an opportunity to be heard upon the validity and amount of the assessment by the council sitting as a board of equalization; if any further notice than the notice to file complaints and objections is required, the city authorities have the implied power to give it; the hearing must be before the assessment is made; this hearing, provided for by Sec. 31, is one where the board of equalization 'shall hear the parties complaining and such testimony as they may offer in support of their complaints and objections as would be competent and relevant,' 33 Colorado, 97; *and that the full hearing before the board of equalization excludes the courts from entertaining any objections which are cognizable by this board.* THE STATUTE ITSELF THEREFORE IS CLEAR OF ALL CONSTITUTIONAL FAULTS. It remains to see how it was administered in the case at bar." (Italics ours.)

The discussion by Mr. Justice Moody of the 5th assignment of error was entirely independent of the discussion of the 9th assignment. After holding that the section of the charter itself was free from constitutional faults, he introduces the discussion of the 5th assignment by saying: "It

remains to see how it was administered in the case at bar," and then this Court proceeds to hold that the manner in which the statute was administered rendered the action of the public authorities void, as being in contravention of the Federal Constitution.

STARE DECISIS.

It will be seen that the only possible question involved in this case is the question as to whether or not Sections 299 and 300 of the charter afford a hearing, because all the objections to the preliminary steps in creating the public improvement in question are settled by the assessing ordinance, declaring that the preliminary steps have been complied with. This declaration made in the ordinance was authorized by charter, and forecloses, according to all the authorities, the examination into all matters, except the hearing which the taxpayers are entitled to before the assessment is made.

The maxim or rule of *stare decisis* is a rule of policy, a rule affecting the practical administration of justice.

The particular sections involved—Sections 299 and 300 of the charter—have been directly ruled upon five times by the Supreme Court of Colorado, and a similar section of the general statutes of the State has also been ruled upon by the Supreme Court of the State. Four of the cases were decided in January, 1905, eight years before the assessing ordinance in question was passed; and the identical question involved was also passed upon in the case of *Brown v. City of Denver*, 7 Colo. 305, decided in 1884, and as said before when the case of City of Denver v. Londoner, 33 Colo. 104, was brought to this Court, and decided in 210 U. S., this Court held that the sections of the charter in question afforded due process of law. And the cases referred to, all having decided that the sections of the charter in question provided for a hearing and determination as

to the only step in the proceedings in which the property owner is guaranteed a hearing by the constitutions, both Federal and State, the rulings of the Court have become a rule of law that is as binding as an act of the legislature, or as binding as an act of Congress would be, and even though there might have been a basis for argument as to the accuracy of the decisions of the courts, nevertheless when, as here, a long period of years has elapsed since the adoption of the rule; when property rights have become affected, and when contractual obligations have been entered into based upon the rule, the application of the maxim of *stare decisis* should be invoked to its fullest extent.

Practically all of the public improvements of Denver, including the laying of sewers, paving of streets, the laying of sidewalks, building of viaducts, the acquiring and beautifying of the numerous parks of the City, resulting in the issue of millions of dollars of public improvement bonds now outstanding in the hands of innocent purchasers, were made and done under the provisions of these two sections of the charter. Opinions have been given by eminent attorneys construing the charter provisions in question and giving an interpretation to the decisions of the State Court and this Court concerning the same, to the effect that the charter provisions afforded due process of law; that this Court had so held, and the rule thus established, as has been said before, assumes the dignity of a legislative enactment, and is now beyond the power of the Court to change.

It is said in the case of *American Mortgage Co. v. Hooper*, 12 C. C. A. 293:

> "An adherence to the doctrine of *stare decisis* is undoubtedly necessary to preserve certainty and uniformity in the stability and symmetry of our jurisprudence. When the courts of last resort have announced principles affecting the acquisition of title to real estate, and the principles thus

announced have been long established, frequently recognized, and conformed to, and property rights have been acquired thereunder, it has generally been held that such decisions should not be overturned, although the principles announced therein might otherwise be questioned."

Another leading case, and a case involving the question of *stare decisis* as applied to special assessment cases, is the case of Schumacker, et al. v. City of Cincinnati, 68 N. E. 1 (O.).

See also:

Harvey v. Travelers Ins. Co., 18 Colo. 354;
People ex rel. v. LeFevre, 21 Colo. at p. 241;
Schultz v. Pac. R. R. Co., 36 Mo. 13.

RES JUDICATA.

The Supreme Court below not only held that the matters involved in this case were *stare decisis,* but also held that the same identical matter had been adjudicated in 52 Colo. 15. The Court's opinion in this behalf is found in 171 Pac. at pages 68 and 69, and is as follows:

"In Londoner v. City and County of Denver, 52 Colo. 15, 119 Pac. 156, the allegations of the complaint are substantially the same as in this case. The Londoner suit was brought on behalf of the plaintiff and all others similarly situated in the East Denver Park District. It was alleged, as here, that the rules for apportioning the benefits were unreasonable and unjust; that there were irregularities, inconsistencies, conspiracy and fraud in the preliminaries relating to the notices, protests, remonstrances, and the permission given to some protestants to withdraw their objections. The question of the power of the City to acquire land except by bond issue regularly approved by

the electors, and whether the charter provisions provided due process of law, were also at issue. In that suit, as here, the cause was dismissed on demurrer. * * *

The constitutionality of the provisions of the charter as to hearing of complaints by the board of supervisors is not only settled by the rule of *stare decisis*, but is also *res judicata*, for in Londoner v. Denver, 52 Colo. 15, 119 Pac. 156, plaintiff brought suit upon behalf of himself and all others similarly situated in the East Denver Park District. Plaintiffs in error here were, and are, similarly situated, and they not only could have participated therein, but should have done so, and for this reason the judgment in that case is binding on them. Freeman on Judgments (4th Ed.) 178; 2 Van Fleet's Former Adjudication, 569, 570; Clark v. Wolf, et al., 29 Iowa, 197,207; State ex rel. Brown v. C. & L. R. R. Co., 13 S. C. 290; Lyman, et al. v. Faris, et al., 53 Iowa, 498, 5 N. W. 621; Harmon v. Auditor, etc., 123 Ill. 122, 13 N. E. 161, 163, 5 Am. St. Rep. 502; Canon v. Nelson, 83 Iowa, 242, 48 N. W. 1033; Ashton v. City of Rochester, 133 N. Y. 187, 30 N. E. 334, 28 Am. St. Rep. 619, 623; 23 Cyc. 1269."

The Supreme Court of Colorado had before it the records of both cases, both in the Londoner case and the present case. It could take judicial notice of its own records, and did determine that not only the matter at issue, but the parties, were identical, for the reason that the former case, having been brought by Londoner and others similarly situated, included all the property owners in the taxing district in the first adjudication. So, therefore, not only were the same legal questions in the present case that had been involved and determined in the Londoner case, but the cause of action, the subject matter and the parties were all the same. This latter—the Londoner case—was not brought to

this Court; the action of the Supreme Court of the State became final as to all questions, both State and Federal.

As to the right of the Supreme Court of Colorado to take judicial notice of its own records, see:

15 R. C. L., p. 1115, Sec. 44;
DeBearn v. Safe Deposit, etc. Co., 233 U. S. 24, 32;
Dimick v. Tompkins, 194 U. S. 540, 548;
Hancock v. Diamond Plate Glass Co., 75 N. E. 659, 663 (Ind.);
Chicago Herald Co. v. Bryan, 92 S. W. 906 (Mo.).

In the case of *Southern Pacific R. R. Co. v. U. S.*, 106 U. S. 1, the Court held as follows:

> "A right, question or fact, distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies, and even if the second suit is for a different cause of action, the right, question or fact, once so determined, must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified."

Where, in a case of this character, a suit is brought by a party and others similarly situated, all of those who are similarly situated become parties to the action, at least insofar as the question of *res judicata* is concerned.

City Council of Montgomery v. Walker, 45 So. 586 (Ala.);
State ex rel. Forgues v. Superior Court of Lewis Co., 120 Pac. 313 (Wash.);
Ashton v. City of Rochester, 133 N. Y. 187;
Gallaher v. Moundsville, 34 W. Va. 730.

The cases just cited all involve taxation questions and pertained to matters of general concern, in which it was proper to join others similarly situated.

SPECIAL BENEFITS.

The plaintiffs in error in their complaint attempted to raise an issue based on the allegation, among others, that the special benefits were not commensurate with the assessment against their property, but an examination of the allegations will disclose that such allegations were so indefinite as to raise no issue. They were to the effect that the pretended assessments were made without ratio, without proper apportionment and without any defined plan or scheme; that the pretended benefits were guess-work, purely chimerical and have no reasonable proximation, and cannot be arrived at from any conceivable benefit that said property might now or hereafter derive from the acquisition of said lands or the improvements connected therewith.

It is also alleged in general terms that the assessments are individual, and if any benefits are derived they are derived on account of certain business advantages, rather than general advantages to all of the property involved. The objections, as shown by the complaint, are so general in character as to not form any basis for a determination as to whether or not the property of the plaintiffs is benefited or not.

No citation of authority is necessary to establish the proposition that such allegations present no issue. The allegations must be such that the Court would be enabled from them to determine whether the property in question was specially benefited or not, and it should not be left to conjecture as to whether, or in what amount, the property was benefited.

It, therefore, follows, that these allegations with reference to special benefits are the mere ultimate conclusions of the pleader, and allege no facts from which a Court could determine whether the property was benefited or not. Whether the improvement benefiited the property or not is a question determinable from the facts, and the facts are

within the knowledge of the pleader and should be set forth in such a manner that the Court could determine from them whether or not any cause of action existed.

But let us assume that the facts stated were sufficient for the Court to conclude that the property involved was not specially benefited, or that it was not benefited at all. In such case unless the property owner pursued the remedy provided by the charter, and filed objections under the provisions of Sec. 299 thereof, he would be estopped from questioning the decision of the board of supervisors, sitting as a board of equalization, for Sec. 300 of the charter provides the forum and the method for determining complaints and objections that may be raised by property owners, and it is the only and exclusive tribunal before whom complaints may be made.

As was said in the case of Londoner v. Denver, 52 Colo. at p. 34:

> "Plaintiff concedes, and we have frequently held, that should a property owner defer action until the city council has, by ordinance, determined the matters committed to it, such findings are conclusive, and the property owner is precluded from questioning the same."

There is no fraud charged in the bill against the members of the council in passing the assessing ordinance, and therefore the council, having acted in passing this assessing ordinance, and having had jurisdiction to pass upon the subject matter contained in the ordinance, even though the preliminary steps with reference to the public improvement might have been erroneous, the plaintiff here would be remediless, unless they had availed themselves of the remedy provided by the charter and had filed their objections in the manner provided by the charter.

In this case there were no allegations of fraud against the council; there were no allegations that the assessing ordinance was not passed regularly and in the manner provided by law. There are no allegations that the council, in the exercise of its power in hearing and determining the complaints that might have been filed by property owners, acted in a fraudulent manner or that their action in that behalf was not regular. In the passage of the ordinance in which the assessment was made the council found that the various tracts of land and lots included in the district were specially benefited, and that the assessments were made in accordance with the benefits accruing and resulting to the several tracts included. This finding of the council after the assessing ordinance became a law is not now open to attack.

Page & Jones in their work on Taxation by Assessment, Vol. 2, Sec. 1027, say:

> "In many statutes provisions are found which point out the method in which the property owner must object to defects or irregularities in the proceedings. It is generally held that if a fair and ample opportunity is given to the property owner to be heard by virtue of such statutory provision, he must make his objection in the manner pointed out by statute, and that if he does not object, he cannot subsequently resist or attack the assessment for reasons which he might have urged in the method provided for by statute. The loss of such defenses to the property owner is sometimes referred to principles of estoppel, though it is also occasionally spoken of as waiver, or as laches, or as resting upon the principle that proceedings cannot be attacked collaterally."

The same authors, at Sec. 1026 of their work, say:

> "A common example of the foregoing principle exists where the statute contemplates the formal presentation of objections, remonstrances, protests, and the like, at a certain stage of the assessment proceedings. If the property owner fails to make such formal objection at the stage required by statute, he is precluded from making such objection at a later stage, when the improvements have been completed, the benefits secured to his property, and the assessment levied."

The foregoing text from Page & Jones is supported by cases from practically every state in the United States.

As was said in the case of *Voigt v. Detroit City*, 184 U. S. 115, 122:

> "And it is only with the charge upon him that he is concerned, *and of that alone can he complain.* In the legality of that charge is necessarily involved the legality of all which precedes it and of which it is the consequence. The Supreme Court of the State decided, as we have seen, 'that the amount of the taxes which may be assessed upon the district, or upon any given parcel of land, cannot exceed the benefits.' On the hearing given, therefore, the property owner can show a violation of the rule, if a violation there be, and the showing will take his land out of the district and relieve it from the tax." (Italics ours.)

To the same effect is the case of *Goodrich v. Detroit*, 184 U. S. 432, 438, where this Court says:

> "Thus in *Spencer v. Merchant*, 125 U. S. 345, it was held that, if a state legislature direct the expense of laying out a street to be assessed upon the owners of lands benefited thereby, and also de-

termine the whole amount of the tax and what lands are, in fact, benefited, and provides for notice to and hearing of each owner, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of property without due process of law. Said Mr. Justice Gray (p. 356): 'But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are to be benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited.' So, in *Parsons v. District of Columbia,* 170 U. S. 45, it was held that an enactment by Congress that taxes levied for laying water mains in the District of Columbia should be at a certain rate per front foot against all lots or lands abutting upon the street in which the main should be laid, was conclusive alike of the necessity of the work and of its benefits to all abutting property. So, also, it was said in *Williams v. Eggleston,* 170 U. S. 304, 311: 'Nor can it be doubted that, if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement. And in so doing it is not compelled to give notice to the parties resident within the territory or permit a hearing before itself, one of its committees, or any other tribunal, as to the

question whether the property so included within the taxing district is in fact benefited.' Cooley on Taxation, 2nd ed., p. 149.

This question, however, is decided in the case of *Voight v. Detroit City, ante,* p. 115, recently disposed of, and will not be further considered here. Indeed, so far as this question is concerned, this case might be affirmed upon the authority of that."

In the case of *Londoner v. Denver,* 52 Colo., 11, 25, it was said:

"It is ordinarily a legislative function to create special taxing districts and to charge the cost of a local improvement therein, in whole or in part, on the property benefited in proportion to the benefits thereto. *Webster v. Fargo,* 181 U. S. 394. And the charter of the city and county of Denver, adopted in obedience to an express mandate of the constitution of the state, with respect to municipal matters, including the creation of taxing districts for local improvements and special assessments for the cost of the latter, has all the force and effect of an act of the legislature. The East Denver Park District was so created and the proposed improvement authorized. Under these circumstances, the only constitutional right possessed by the property owner, as to the making of the proposed improvement, is to a hearing upon the question of what is termed, the apportionment of the tax; i. e., the amount of the tax which he is to pay. *Voigt v. Detroit,* 184 U. S. 115; *Goodrich v. Detroit, idem,* 432.

This constitutional right is fully protected by the notice which the charter, Sections 299 and 328, 'requires shall be given by the city clerk and the

proceedings in accordance therewith, afford the owners full opportunity to be heard on the question of assessments against their property.' Denver v. Dumars, 33 Colo. 94, 101."

Notwithstanding that notice had been given to these plaintiffs and other property owners in the district, informing them of the apportionment of the taxes on their property, they failed to appear before the board of supervisors for the purpose of protesting against the assessment against their respective properties or to point out any inequalities in the apportionment, or to point out any illegality of the assessment attempted to be laid against them, but they stood idly by and permitted the property to be acquired, the expense to be undergone and the bonds to be issued and sold by the City and County of Denver. As a result of their quiescence they received whatever benefits might accrue to them, whether commensurate with the assessment or not, and now, having received those benefits, the improvement having been completed, they seek to escape their share of the burden for the improvement.

There is another charter provision contained in the charter of the City and County of Denver, passed for the obvious purpose of preventing just such an unfair condition as would be here presented. This provision of the charter is to the effect that property owners are given thirty days after the assessing ordinance has been passed within which to come in and pay their tax, if they do not wish to pay it in the installments provided in the charter. If they pay the tax within thirty days a cash discount is allowed. This thirty-day provision is also a statute of limitations, and the Colorado Supreme Court has held that it effectually bars all matters which are or may be raised with reference to statutory proceedings. Among other things the section provides:

"All persons so electing to pay any installments shall be conclusively considered and held as consenting to said improvements, and such election shall be conclusively held and considered as a waiver of any and all right to question the power or jurisdiction of the city and county to construct the improvements, the quality of the work, the regularity or sufficiency of the proceedings, or the validity or correctness of the assessment."

In the case of *City of Denver v. Campbell*, 33 Colo. 163, in discussing this section of the charter the Court said:

"The purpose of Section 34 is to prescribe the period when preliminary steps of the character under consideration are finally and conclusively settled, and the owner inhibited from making an issue on them. In effect, it says to the owner: If you do not pay your assessment within thirty days after the publication of the assessing ordinance, you will be conclusively presumed to have elected to pay it in installments, and, having made this election, you are precluded from thereafter raising any question with respect to the steps taken, or the regularity of the proceedings, which are purely statutory, and not required by virtue of any provision of the constitution. The omission to raise any of these questions before the presumption attaches that the preliminary steps of the character under consideration have been taken is a bar to raising them thereafter. The section does not state that a suit must be commenced before this presumption attaches, but its effect in this respect is to bar any action the purpose of which is to put these questions in issue, unless commenced before that period, when, according to the terms of the section, presumptions attach which cannot be rebutted."

And again, on page 171, the Court says:

"In conclusion, it is perhaps not amiss to add, although not deciding the point, that the trend of the decisions of recent years, involving questions affecting the validity of municipal improvements, is to be less technical than formerly, and to require owners whose property may be assessed for such improvements to be at least reasonably diligent in protecting their rights before the improvements are completed. Lord v. Bayonne, 46 Atl. (N. J.) 701; Lewis v. Albertson, 53 N. E. (Ind.) 1071; Arnold v. City of Ft. Dodge, 82 N. W. (Iowa) 495; Clinton v. City of Portland, 38 Pac. 407.

Elliott, in his work on Roads and Streets (2nd ed.), says: 'There is sound reason for extending, rather than abridging, the principle of estoppel in street assessment cases.'

Owners ought not to be permitted, by their silence, to mislead contractors, municipal authorities, and those supplying the money to pay for improvements by the purchase of bonds, respecting matters which could have been corrected had the attention of the municipal authorities been called thereto in apt time."

In Wagner v. Baltimore, 239 U. S. 207, 218, it is said:

"It is further urged, and much stress seems to be laid upon this point, that the complainant and others similarly situated were given no opportunity to be heard as to the amount of benefits conferred upon them, and the proper adjustment of the taxes among property owners. But this question, like the other, is foreclosed by the former decisions of this Court. This sasessment, and the classification of the property to be improved, were

fixed and designated by legislative act. It was declared that the property which had been improved by paving theretofore should, according to the width of the paving in front of the respective properties, be assessed at a certain sum per foot front. We think such a tax, when levied by the legislature, did not require notice and a hearing as to the amount and extent of benefits conferred in order to render the legislative action due process of law within the meaning of the Federal Constitution."

STATUTORY CONSTRUCTION AND THE EFFECT OF THE STATE COURT'S CONSTRUCTION UPON THE SUPREME COURT OF THE UNITED STATES.

The Supreme Court of the State of Colorado, as has been before said, has placed a construction upon Sections 299 and 300 of the charter (formerly Sections 30 and 31 of the charter.) In the case of the *City of Denver v. Londoner*, 33 Colo., at p. 117, the Court holds that Sec. 31 of the charter does not take away from the legislative power the discretion of the City Council, and that it does not vest this discretion in the board of public works (park commissioners), and other decisions of the Colorado Supreme Court have also upheld this same construction.

It has frequently been held that the construction of the highest judicial tribunal of the State forms a part of its statute law as much as an enactment of the legislature.

In the case of *Costillo v. McConnico*, 160 U. S. 674, 680, the Court says:

> "The plaintiff in error has no interest to assert that the statute is unconstitutional because *it might be construed* so as to cause it to violate

the constitution. His right is limited solely to the inquiry whether in the case which he presents the effect of applying the statute is to deprive him of his property without due process of law."

Also, in the case of *St. Louis Land Co. v. Kansas City,* 241 U. S. 419, 427, this Court says:

> "The extent of the authority conferred upon the city by its charter, the construction of the various provisions of the charter, the validity, scope and effect under the state law of the ordinances adopted by the city, and the scope and effect of the original and supplemental proceedings, and the rights of the parties thereto, under the state law, are state questions as to which the decision of the state court is controlling."

In the case of *Baltimore Traction Co. v. Baltimore Belt R. R .Co.,* 151 U .S. 137, it is said:

> "The Supreme Court has no jurisdiction of an error to a state court in condemnation proceedings, on the ground that the condemnation statute is repugnant to the 14th amendment, in that it fails to provide for notice, when the highest court of the state has already decided that the statute does require notice."

The case just referred to cites the case of *Green v. Neal,* 6 Pet. 291, a case tried in this Court in 1832. In the course of the opinion the Court says at page 297:

> "In a great majority of the causes brought before the federal tribunals, they are called on to enforce the laws of the states. The rights of parties are determined under those laws, and it would be a strange perversion of principle, if the judicial exposition of those laws, by the state tribunals, should be disregarded. These expositions consti-

tute the law, and fix the rule of property. Rights are acquired under this rule, and it regulates all the transactions which come within its scope. • • • On all questions arising under the constitution and laws of the Union, this court may exercise a revising power; and its decisions are final and obligatory on all other judicial tribunals, state as well as federal. A state tribunal has a right to examine any such questions and to determine them, but its decision must conform to that of the Supreme Court, or the corrective power may be exercised. But the case is very different where a question arises under a local law. The decision of this question, by the highest judicial tribunal of a state, should be considered as final by this court, not because the state tribunal, in such a case, has any power to bind this court; but because, in the language of the court, in the case of *Selby v. Guy*, 11 Wheat. 361, 'a fixed and received construction by a state in its own courts, makes a part of the statute law. • • • If the construction of the highest judicial tribunal of a state form a part of its statute law, as much as an enactment by the legislature, how can this court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alterations in a statute; and why should not the same rule apply, where the judicial branch of the state government, in the exercise of its acknowledged functions, should, by construction, give a different effect to a statute from what had at first been given to it? The charge of inconsistency might be made, with more force and propriety, against the federal tribunals, for a disregard of this rule, than by conforming to it. They profess to be bound by the local law; and yet they

reject the exposition of that law, which forms a part of it. It is no answer to this objection, that a different exposition was formerly given to the act, which was adopted by the federal court. The inquiry is, what is the settled law of the state, at the time the decision is made. This constitutes the rule of property within the state, by which the rights of litigant parties must be determined. * * * It is, therefore, essential to the interests of the country, and to the harmony of the judicial action of the federal and state governments, that there should be but one rule of property in a state."

Counsel for plaintiffs states that the question now under discussion was not passed upon in the Londoner case, 33 Colo. 104, but that only the question of notice was passed upon. The quotations from that case show to the contrary, and furthermore, it would be a reflection upon the intelligence of the Supreme Court of the State of Colorado to say that when Section 300 of the charter was presented to it for determination, it did not consider the most vital part of the meaning of such charter provision. And not only has the Supreme Court of the State, as well as this Court, placed a construction upon this statute, but a reference to the assessing ordinance in the present case (Trans. pp. 26-30) shows that this construction was also followed by the city authorities. It recites that the board of supervisors (corresponding to the City Council) of said City and County, sitting as a board of equalization, did, pursuant to, and in accordance with, Sec. 300 of said charter, duly hear and determine each and all of said complaints and objections so filed, and did overrule the same, and did recommend to the Park Commission of said City and County that no modification of its apportionments of said assessment, as set forth in said notice, be made, save and except that the proposed assessment against Lots 3 and 4, Block 146, South Division of Capitol Hill, etc., be

reduced. It then shows that the apportionment as determined by the board of equalization was, by the park board, adopted, and notwithstanding that Sec. 300 of the charter in question might be subject to the interpretation that the board of supervisors did not have the final determination of the matter, their action, nevertheless, was treated as final and no change was made by the park board, but the action of the supervisors was adopted.

It is really unimportant, in view of the opinion in the case of *Paulsen v. Portland*, 149 U. S. 30, whether the board of supervisors were given the final power of determination or the park commission, for under the authority of that case the right given to the City must necessarily be exercised subject to all the limitations imposed by constitutional provision, and where a body is provided for determining objections that may be filed, and the charter is silent as to the notice or the time of hearing, the authority will be implied in the body holding the hearing to fix the time and place of notice, and to do whatever is necessary to comply with constitutional requirements. On page 38 of the opinion just referred to, Mr. Justice Brewer says:

> "But were it otherwise, while not questioning that notice to the taxpayer in some form must be given before an assessment for the construction of a sewer can be sustained, as in any other demand upon the individual for a portion of the property, we do not think it essential to the validity of a section in the charter of a city granting power to construct sewers that there should in terms be expressed either the necessity for or the time or manner of notice. The city is a miniature state, the council is its legislature, the charter is its constitution; and it is enough if, in that, the power is granted in general terms, for when granted, it must necessarily be exercised subject to all limita-

tions imposed by constitutional provisions, and and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council. Thus, in the case of *Gilmore v. Hentig*, 33 Kansas, 156, it was held thus: 'Where a statute authorizes a city to provide for the construction of sewers and drains, and to tax the costs thereof upon the adjacent property owners, but does not require that any notice shall be given to the property owners, *held*, that such failure to require notice does not render the statute unconstitutional or void, but notice must nevertheless be given, and the city would have a broad discretion with reference to the kind of notice and the manner of giving the same.' "

So, therefore, the Supreme Court of the State of Colorado would have had the right to have adopted perhaps a different construction of this statute, and had they adopted a different construction, and had they also in that construction brought the charter provision within constitutional limitations, then the charter provision would not have been obnoxious to the Federal Constitution. The construction placed upon the charter by the Supreme Court of the State is much more important, from a constitutional standpoint, than the wording of the statute or charter provision itself, for not until the Supreme Court of the State has passed upon a statute is its interpretation or construction finally determined.

CONCLUSION.

Had the defendants in error herein filed a motion to dismiss and affirm, under the rules of procedure of this Court it would have been the duty of this Court to sustain such motion, and it is the duty of this Court now to take similar action, for the reason that in the case of *Londoner v. City and County of Denver*, 210 U. S. 373, all of the questions that could possibly be raised by the issues in this case were finally passed upon and determined, and this case should be dismissed upon the authority of that case.

The State of Colorado, commencing as far back as 1884, has announced principles of law which are controlling as to the constitutionality of Sec. 300 of the charter. It has passed upon the same identical section at least five times. It has thereby established a rule of property in Colorado, under which contracts have been made, bonds have been issued and investments have been made therein. The report of the city auditor of the City and County of Denver shows that the total issue of bonds in the present case was $2,685,000; that of said amount $1,435.000, or more than half, have been paid off. The lands for these public parks have all been purchased and paid for, and they have been improved, and all of the property owners in the district have received the benefits thereof, and therefore, the rule of *stare decisis* should be applied to its fullest extent. But not only should the rule of *stare decisis* be applied, but the rule of *res judicata* as well, for in a former proceeding the same parties were before the courts of Colorado; the decision was adverse to them; they carried the case to the Supreme Court of the State, where the decision was also adverse. The Supreme Court of the State has said that both the subject matter and the parties are identical, and rendered its decision based upon, among other things, this bar.

Colorado has placed a construction on the sections of the charter in question; its Court of last resort has so construed them that they are not obnoxious to the Federal Constitution, and in determining what the statute means in Colorado it is necessary to read this decision of its final Court into the same. It is, therefore, the duty of this Court to follow the construction placed upon the charter provisions by the Supreme Court of the State. To say otherwise would be to say that in the Federal Courts a judgment would be one way, but in the State Courts another. It is the duty of the Colorado Court to follow the rule of *stare decisis* that it has established, and it can do nothing else than to uphold the provisions.

We therefore respectfully submit that the action of the Supreme Court of the State should be affirmed, or that this writ of error be dismissed for the reason that no sufficient question is raised to justify this Court to enter into a determination on the merits.

Respectfully submitted,

James A. Marsh,
Norton Montgomery,
Attorneys for Defendants in Error.

NO. 119

OCTOBER TERM, 1919.

[redacted] Donahue Hardy, [redacted]

Plaintiff in Error,

vs.

[redacted] County Court of Denver, et al.,

Defendants in Error.

Error to the Supreme Court of the State of Colorado.

SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

James A. Marsh,
Norman Montgomery,
Attorneys for Defendants in Error.

THE SMITH-BROOKS PRINTING COMPANY, DENVER, COLO.

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IN THE

Supreme Court of the United States

NO. 110

OCTOBER TERM, 1919.

HENRY FARNCOMB, EMMA DONAHUE, HENRY LORIE, ET AL.,
Plaintiffs in Error,

VS.

THE CITY AND COUNTY OF DENVER, ET AL.,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

In the preparation of the original brief by defendants in error herein the discussion of a certain charter provision of the City and County of Denver was overlooked. The

charter provision referred to is Section 327 of the Charter of the City and County of Denver as amended to December 1, 1911. It is Section 95 of the Charter as revised to May 17, 1916. The section is referred to but not quoted in full at page 35, folio 70 of the transcript of record and is also referred to and quoted from in the brief of plaintiffs in error at page 7.

The plaintiffs in error in this case did not furnish the defendants in error with a copy of their brief until Saturday, the 15th day of November, 1919, and on the same day counsel for defendants in error received notice by wire from the clerk of this Court that the case would probably be reached for oral argument on the Tuesday following and in the haste to get the briefs printed before the case was reached the question we now wish to discuss was overlooked. The section of the Charter referred to and which we have not heretofore discussed is as follows:

> "Sec. 327. Or, whenever the cost of any such park site or parkway can be definitely ascertained, said bonds or any part or parts thereof may be issued and sold by the park commission, with the approval of the mayor, at not less than par, upon public advertisement for not less than ten days in some newspaper of general circulation published in the city and county of Denver, and such other newspapers as may be designated by the mayor and park commission; and the proceeds may be used exclusively by the park commission with the approval of the mayor, in the purchase or condemnation of park sites and parkways, and in any case sufficient of said bonds may be issued and sold in like manner to pay the costs of surveying,

evidencing and acquiring necessary titles, the necessary costs of court, the preparation of the assessment rolls and other incidentals. The bonds so issued shall be paid by special assessment upon all the other real estate in the district in the proportions and amounts determined by the commission and assessed by ordinance, and shall be paid only out of the moneys collected from said assessments; and all the moneys so collected shall be set apart and shall constitute a fund for the payment of said bonds and interest thereon until payment of said bonds and interest in full; provided, that before acquiring any real estate or issuing any bonds for the purposes aforesaid the commission shall prepare a map of the district and *apportion* the cost of the improvement on all the other real estate in the district *in proportion to the benefits* of each piece of real estate accruing in consequence of the establishment of such parks or parkways in said district, and *in accordance with such rules for apportioning the benefits* as to the commission may seem just and reasonable; and shall by advertisement for ten days in some newspaper of general circulation published in the city and county, give notice to the owners of the real estate to be assessed of the proposed purchase or condemnation, with a description of the lands to be acquired, the estimated cost, the number of installments and time in which the assessments will be payable, the rate of interest on unpaid installments, the rules adopted by the commission for apportioning the benefits, as aforesaid, and the time, not less than ninety days after the first publication, when the question

of the proposed purchase or condemnation will be considered by the commission; that said map and all proceedings of the commission are on file and can be seen and examined by any person interested during business hours, within said period of ninety days, at the office of the secretary of said commission, *and that all complaints and objections that may be made in writing by owners of any real estate to be assessed will be heard and determined by the commission before final action of the commission in the premises.*

The commission shall, at the time specified or thereafter, consider all such complaints and objections, and may modify or confirm their apportionments, and shall finally determine whether said lands shall be acquired for said purposes; but if, within the time above specified a remonstrance shall be filed with the secretary of said commission, subscribed by the owners of twenty-five per cent, in area of the real estate which is to be assessed then the proposed purchase or condemnation shall not be made, and the proceedings shall not renewed for one year thereafter; and the finding of the council by ordinance that such notice was duly given, or that such remonstrance was or was not filed, or was or was not subscribed by the required number of owners aforesaid, shall be conclusive in every court or other tribunal. (Italics ours.)

It will be noticed, independent of Sections 299, 300 and 328 of the charter, that in so far as the *apportionment* of the taxes is concerned this Section 327 affords notice to the property owners and gives them an opportunity to be heard

before the park commission. It not only gives the property owners an opportunity to be heard but it provides that the commission shall determine the complaints and objections that may be filed pursuant to the notice before final action is taken by the commission. This section of the charter now under consideration was not involved in the previous cases decided by the Supreme Court of the State of Colorado and was not involved in the Londoner case which came to this court and was decided in 210 U. S. at page 373. The sections of the charter involved in those cases were sections 299 and 300, and the section to which we are now making reference was a section adopted since those cases were decided and affords not a substitute remedy for the property owner but a separate and additional remedy. Section 327 just quoted from, if there were no other provision in the charter providing a hearing for the property owner, would afford due process of law unless the apportionment fixed by the Board of Park Commissioners would be substantially increased after this step in the proceeding was passed. But, so far as this case is concerned and in so far as the allegations with reference thereto are concerned, there was no change made after this preliminary apportionment of the assessments by the Park Commission. Therefore, had the plaintiffs in this case availed themselves of the opportunity afforded by Section 327 and appeared before the commission that had power to hear and determine their matters they would have been afforded due process of law. The remedies of the owners provided for in the charter are cumulative. First, the owner can appear before the board and must appear before the board if he is dissatisfied with the apportionment that has been made, and the apportionment having been made by the board the property owner can also complain if the apportionment is above a legal charge on his property.

In this connection and again referring to the case of *Voight v. Detroit City*, 184 U. S. 115, 122, quoted at page 22 of our former brief where the Court said, "and it is only with the charge upon him that he is concerned, and of that alone can he complain." And in this same connection we wish also to again direct the Court's attention to the case of *Goodrich v. Detroit*, 184 U. S. 432, 438, which is quoted from at page 22 of the brief of defendants in error. If it could be objected as a matter of construction of this charter provision that the time for hearing was not specifically provided for therein, the charter provision is sufficient, following the rule laid down by this Court in *Londoner v. Denver*, 210 U. S. 373, and also in *Paulsen v. Portland*, 149 U. S. page 30, where it is held that the failure to provide in a charter provision for the time and place of notice does not of itself render the charter provision unconstitutional and that the authorities will have the implied power to give the proper notice although the same is not expressed in terms in the fundamental law. As has been before said herein, Section 327 is in no sense in conflict with Sections 299 and 300, but affords an additional ample hearing for the property owner in all of those matters that the Federal Constitution guarantees a hearing in.

A case could be imagined in which this Section 327 would not afford due process of law. Suppose that after the notice had been given, as provided in the section, hearings would be had and determinations of objections thereunder, that changes in the apportionment of cost would be made sufficient to seriously affect a particular property owner's assessment and that the assessment against him would be increased over and above that apportioned by the commission. In such case, unless a further opportunity was afforded the property owner, he might have grounds for

complaint, but in this case, the pleadings do not show, there were any changes made in any manner affecting the plaintiffs in error. The price which was paid for the acquisition of the property was much less than the estimate made by the commission. Therefore, even if a case might be imagined wherein due process of law would not be afforded such a case is not presented by the issues herein.

In *Spaulding v. Denver,* 33 Colorado, 172, 175, the Supreme Court of Colorado said:

> "No protests were made by plaintiffs against these exceptions, nor did they file any complaints or objections in response to the notice given by the clerk. No doubt, in the preliminary stages of the creation of a sewer district, the question of exemptions of property therein from bearing its legal proportion of the expense of a local public improvement could be heard and determined, but owners injuriously affected by such exemptions must move in apt time. They will not be permitted to remain silent touching the matters of which they have notice, and then, for the first time, after the improvement has been completed and the assessment made claim that the assessment is void because of matters which might have been corrected had they interposed their objection before the expense of construction was incurred."

And the Court in the same case, at page 178 of the opinion said:

> "Before parties aggrieved by an assessment levied under a fixed rule which appears to be reasonable and likely to proximate an equality of as-

sessments, can appeal to a court of equity to relieve them from an alleged excess, or because their property was not, in fact, benefited, they must at least first apply for such relief to the special tribunal which the law has provided to settle these questions. The plaintiffs never attempted to raise any of these questions before the city authorities, and are, therefore, not in a position to litigate them in a court of equity.—*City of Denver v. Dumars, supra.*"

In this case there were two forums provided by the Charter either of which could have granted relief against the objections complained of, but as no objections were filed before either forum, plaintiffs are not now in a position to seek relief in equity and claim that due process of law was not afforded.

We, therefore, again respectfully submit that the judgment of the Court below should be affirmed.

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